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Parenthood and European Union law: old ideologies and new ideals

The concept of parenthood, the nature of parenting, even who is a parent, are all contested ideas. Many disciplines are grappling with changing realities in relation to parenting, attempting to map developments, contextualise them and examine their effects; the prospects for the future are analysed and prophecies made. In the context of European Union law, however, such rigorous and complex theoretical analyses are largely absent. Partly this is due to the limited competence of the Union to act in the controversial terrain of parenthood. Mostly, however, it is due to a fundamental theoretical failing, to an ignorance of the wider panoply of contexts and circumstances which affect parenthood today. Thus, to the extent that the concept of parenthood, and particularly ideas about motherhood, have come within the competence of Union law and before the Court of Justice, a remarkably narrow and traditional approach has been taken, premised on the 'dominant ideology of the family' discussed in chapter 2.

It is imperative that a reconsideration of this limited, atheoretical and apolitical approach to parenthood takes place. The Union must move away from a traditional ideology of motherhood and fatherhood. For law and policy to reproduce, legitimise and promote gender distinctiveness in parenting is to entrench existing patterns which are often discriminatory. The Union must embrace more modern approaches to parenting based on principles of gender neutrality. Although it might be right to wonder whether parenting can ever be gender neutral, it is important that law and policy proceed on the basis of seeking this ideal. Such a theoretical foundation will better equip the Union to deal with the complex issues it is – and will be – facing. It will also complement the Union's commitments to equality between women and men, non-discrimination and human rights.

This reconsideration of the concept of parenthood is both necessary and to some extent unavoidable. Traditional ideas regarding parenthood, as with childhood, are being challenged today by social and demographic changes in families. New biomedical technologies are influencing our ideas regarding parenthood and parenting, and political rhetoric and ideologies are evolving to take these complex

changes into account.¹ At the same time, gender transformations and the ongoing (re)negotiation of the gender contract demand continual reconsideration of parenthood. In legal terms, this manifests itself in raising questions regarding the role of law in the regulation of parenting, the extent of appropriate state 'interference' in families, parenting, childcare and childrearing and the extent to which gay and lesbian families and parents face discrimination legitimated through law. The focus here is on the role of Union law in the organisation of parenting, with some additional analysis of the Union's approach to the child-parent relationship. Thus, although parenthood and parenting is more than a discussion about its organisation, the analysis is limited to the scope of Union law to influence certain aspects of parenthood.

Nonetheless, it may not be immediately apparent how or why the Union is engaged in fashioning the concept of parenthood. But, ever since the adoption of measures designed to eliminate discrimination on the grounds of sex, the EEC and now the Union have been implacably engaged in the production, reproduction and legitimation of ideas about parenting. This has not always been an explicit process, and part of the analysis of this chapter is aimed at revealing the implicit assumptions about parenthood. It is through an analysis of the case law of the Court that its assumptions about parenthood, and about the norm of motherhood in particular, are revealed. This pattern of case law exposes the traditional notions upon which the case law of the Court has been determined in the sex equality field. In doing so, the analysis suggests that the approach of the Court is based on an understanding of parenthood which is based on the 'dominant ideology of the family', which conceives of the 'family' as a married, heterosexual two-parent unit, with specific gendered roles for women and men. These roles assume a breadwinner father, with caregiver mother.

Further, as the Union's competence in the field of employment policy, as well as employment law, has increased, it has become more apparent that the organisation of parenting has economic effects and vice versa. In short, where childcare services are minimal or of poor quality, or where workplaces are insufficiently flexible to allow employees to balance their home lives with their professional lives, the labour market may lose highly skilled labour. Thus, the flexibility of the labour market, and the need to ensure a balance between home and professional lives, has become the focus of Union law and policy.

But it is not only in the field of employment law and policy that the Union has begun to engage with parenthood. As the Union has expanded its competence into the family law field, measures on the recognition and enforcement of judgments in the custody arena have become part of Community law. Although the first measure adopted in this field was based on the status of marriage, the latest

¹ See further Andrew Bainham, Shelley Day Sclater and Martin Richards, 'Introduction' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds.), *What Is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999), pp. 1–23 at p. 1.

Regulation moves away from status towards recognising parenthood as the basis for intervention. This approach is reinforced by a provision in the Union's Charter of Fundamental Rights which attests to the right of the child to have contact with both parents.

In addition to developments in the employment and family law spheres, the Union is belatedly addressing the changing realities of family life, and therefore the concept of parenthood, as part of its evolving free movement jurisdiction. As Helen Stalford argues, the very success of the free movement provisions, together with the changing nature of family life, means that the existing Community rules often aggravate, rather than facilitate, the organisation of cross-national families.² Thus, the Union is beginning to engage with the concept of parenthood and its regulation in order to deal with the consequences of its rules on free movement, particularly in the private sphere.

In essence, therefore, we see some contradictory messages arising from Union law and policy regarding parenting. The Court of Justice, particularly in its sex equality case law, replicates a traditional approach to parenthood, based on a traditional ideology of motherhood. Further, although the employment policy of the Union recognises the need to balance paid work and family life, and that this impacts on parenting, this policy also remains within a traditionalist paradigm. In other fields of law and policy, it appears that a more egalitarian, gender neutral, approach may be emerging. For example, family law measures have recently been expanded to include disputes regarding parental responsibility for all children, not just disputes regarding the joint children of married parents. However, before considering these different fields of law and policy in more detail, the following section examines the old ideologies on which much of the current law is based and suggests that new emerging ideals of gender neutral parenting are a more appropriate basis for Union law and policy.

4.1 Parenthood: old ideologies and new ideals

The concept of parenthood and ideas and expectations about parenting vary over time, from society to society, and are constantly changing.³ Nevertheless, there appear to be certain constants, particularly the enduring desire of society generally to dichotomise sexual differences and to explain them as natural, not socially constructed. In the context of parenthood, this has led to the supremacy of the 'dominant ideology of the family', with specific roles for women and men. Thus, the model of the caregiving mother/wife and breadwinner husband/father

² See further Helen Stalford, 'Regulating Family Life in Post-Amsterdam Europe' (2003) 28 *European Law Review* 39–52.

³ Parenthood has been defined as a 'fluid set of social practices and expectations that are historically and culturally situated and its meaning is contingent upon broader social, political and economic exigencies': Bainham, Sclater and Richards, 'Introduction', p. 1.

has been a dominant presence in all European states, albeit that it has been more ingrained in some countries than in others. Unfortunately, despite social and demographic changes, this normative vision of the family retains its purchase on law and policy making within the Union.

4.1.1 The dominant ideologies of motherhood and fatherhood

The concept of the 'dominant ideology of the family' views mothers as crucial to the emotional and physical well-being of any children, while the role of the father is to be the main/sole provider.⁴ For women, these prescriptions on motherhood are based on an ideology of motherhood premised on the now-discredited theories of mother–infant bonding which privileges the mother–child relationship. The consequences of an ineffective attachment or bond were said to have devastating pathological consequences for children, ranging from restricted development, to emotional immaturity, to juvenile delinquency.⁵ Some studies even recorded failure to bond in the first few hours after birth as the root cause of child abuse or neglect.⁶ Accordingly, it was claimed that full-time employment of a mother was on a par with 'death of a parent, imprisonment of a parent, war, famine' and so forth, as a cause of family breakdown.⁷ Despite the scientific criticism of this research, and the changes in society and families since the research was published, there remains a 'direct continuation' of these ideas leading to prescriptions of 'what constitutes the right family and what provides for the needs of an infant and child in order for it to become a physically healthy adult'.⁸ Thus, the mother–child dyad is not seen as based on choice, individualism and equality, but on nature, self-sacrifice and altruism.

Fatherhood is similarly constrained, this time by an exclusion from care work and an emphasis on paid work as being the primary role for fathers. Thus, the father–child relationship is not characterised by a 'natural' bond, but is based on a social and legal reality. It is based on the ideas of proprietary rights over the child and is therefore more akin to considerations of rationality and rights. There is little flexibility here, just as there is little in relation to motherhood. The father as breadwinner and provider, as authority figure and head of the family, remain dominant themes in discussions of fatherhood, even today: provision, protection

⁴ For a more detailed analysis of the dominant ideology of motherhood employed in the jurisprudence of the Court of Justice, see Clare McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29–44.

⁵ Diane Eyer, *Mother Infant Bonding – A Scientific Fiction* (New Haven: Yale University Press, 1992), p. 47.

⁶ M. Lynch, J. Roberts and M. Gordon, 'Child Abuse: Early Warning in the Maternity Hospital' (1976) 18 *Developmental Medicine and Child Neurology* 759, discussed in Eyer, *Mother Infant Bonding*, p. 31.

⁷ John Bowlby, *Maternal Care and Mental Health* (Geneva: World Health Organization, 1951), p. 73, discussed in Eyer, *Mother Infant Bonding*, p. 50.

⁸ Juliet Mitchell and Jack Goody, 'Family or Familiarity?' in Bainham, Sclater and Richards (eds.), *What Is a Parent?*, pp. 107–19 at p. 115.

and authority, as described by Sara Ruddick.⁹ Thus, despite some acceptance of the changes taking place within families, there remains a continuing 'ideological emphasis on mother-as-carer and father-as-financial-provider that fixes the centrality of nuclear parenting, even where that is absent as a social reality'.¹⁰ It goes without saying that this ideology of family is heterosexist, eschewing any scope for gay and lesbian families and parenting.

4.1.2 Towards gender neutral parenthood

The aim here is not to disparage any need for parental 'bonding' with children. Indeed, as Sandra Fredman has cogently argued, there remains 'insufficient recognition of the value of children and of active parenting' in European society.¹¹ The crucial point is the need to value *parenting*, not only mothering and not only parenting within the heterosexual nuclear family. My criticism, therefore, is directed at the privileging of the mother-child relationship, exclusive of the role of the father, and the consequences that this has for the organisation of childcare and families. An evolution in thinking is therefore required, away from the dominant ideology of motherhood towards a gender neutral approach to parenthood. A gender neutral approach attempts to depart from the dominant ideology of motherhood and family, seeking to free women and men to pursue the roles, both within families and in the public sphere, which suit them and their children best. In addition to different roles within families, this approach also acknowledges different forms of families as being equally viable and capable of fostering positive parenting. A 'gender neutral' perspective therefore seeks an end to the heterosexual norm of parenting and to the defined roles of 'mother' and 'father'. This is akin to Susan Moller Okin's vision of a 'gender-free' society which would result from a 'diminution and eventual disappearance of sex roles, of expectations that persons of different sexes think, act, dress, adorn themselves, feel, or react in ways supposedly representative of their sex'.¹² In such a society, there would be no assumptions about male and female roles and men and women would participate equally in all spheres of life, including infant care.¹³

In addition, to the extent that society would be free of gender, Moller Okin argues that this would contribute significantly to diminishing the stigmatisation of homosexuality and discrimination on the grounds of sexual orientation.¹⁴ In relation to parenthood, therefore, this vision would see a gradual end to discrimination

9 Sara Ruddick, 'The Idea of Fatherhood' in Hilde Nelson (ed.), *Feminism and Families* (London: Routledge, 1997), p. 207, discussed in Alison Diduck, *Law's Families* (Butterworths: London, 2003), p. 85.

10 Mitchell and Goody, 'Family or Familiarity?', 115.

11 Sandra Fredman, *Women and the Law* (Oxford: Oxford University Press, 1997), p. 181.

12 Susan Moller Okin, 'Sexual Orientation and Gender: Dichotomizing Differences' in David Estlund and Martha Nussbaum (eds.), *Sex, Preference and Family - Essays on Law and Nature* (Oxford: Oxford University Press, 1997), pp. 44-59 at p. 45.

13 Moller Okin, 'Sexual Orientation and Gender', 45.

14 Moller Okin, 'Sexual Orientation and Gender', 46.

against gay and lesbian parents and families. Indeed, Moller Okin argues that 'in some important respects', gay and lesbian couples may provide a 'particularly good model of parenthood'.¹⁵ The reason is that such couples are 'far less likely than heterosexual families to practise anything resembling a gendered division of labour'.¹⁶ Thus, far from gay and lesbian families being seen as a threat to 'family values', such relationships 'may provide, in important respects, a very good model for heterosexual families to follow'.¹⁷ This is borne out by empirical evidence demonstrating that, in lesbian parenting partnerships, there is a more egalitarian distribution of both care work and paid work than in the majority of heterosexual partnerships.¹⁸ In particular, biological motherhood was found to be a poor indicator of employment differences between partners and non-biological co-mothers also participated to a greater extent than biological fathers in care and household work.¹⁹ What this perhaps demonstrates is that gendered expectations regarding parental roles, as well as the dominance of existing patterns of work distribution, make it considerably more difficult for heterosexual partners to break free from existing constraints. The corollary is that lesbian partners may be better able to negotiate an egalitarian approach to parenting, due to their shared gendered histories and the lack of prescriptive family models.

4.1.3 Equal parenting

In a two-parent household, same sex or different sex, this gender neutral approach would be synonymous with 'equal parenting'. That is, the idea that parents share care work and paid work: a dual-breadwinner, dual-earner pattern.²⁰ Such a pattern is to be preferred to the 'full-commodification' strategy of early second wave feminism. Full commodification, that is, equality based on facilitating women working full time, with care work delegated to market or public services, in the end does little to foster gender neutral parenting, as the work of caring for children is generally delegated to other women. Fathers remain removed from childrearing and retain their primary role as financial providers. Furthermore, the pursuit of a full-commodification strategy is a largely class- and race-bound

15 Moller Okin, 'Sexual Orientation and Gender', 54.

16 Moller Okin, 'Sexual Orientation and Gender', 54.

17 Moller Okin, 'Sexual Orientation and Gender', 56. For a similar argument, see also Gillian Dunne (ed.), *Living 'Difference' – Lesbian Perspectives on Work and Family Life* (New York: Harrington Park Press, 1998).

18 See the studies discussed in Dunne (ed.), *Living 'Difference'*.

19 See the studies discussed in Dunne (ed.), *Living 'Difference'*.

20 The discourse on 'equal parenting' generally proceeds on the basis of debating the negotiation of paid and care work between a heterosexual couple. This is not just due to the numerical significance of such families, but also because of the centrality of discussing heterosexual parenting to the gender contract. In addition, as discussed above, evidence suggests that, in lesbian families, care work is already shared in a more egalitarian form: Dunne (ed.), *Living 'Difference'*.

strategy.²¹ Access to paid work, and especially full-time paid work, does not necessarily bring liberation and fulfilment for women, where the options are limited and of poor quality.²² The determined pursuit of full-time employment, with less reliance on families, is not therefore universally accepted.²³

Indeed, Maria Rerrich argues that, in Germany, although there has been a move away from a female full-time carer norm of parenting, this has not resulted in changes in the activities of men, but in communities of women arranging and rearranging care in informal and market ways.²⁴ In this way, household work and caring becomes distributed not between women and men, but among women, creating new divisions of class and race between women, with men continuing as before.²⁵ The result is a growing 'marketized female domestic economy' with 'class closure' the result.²⁶ Rerrich further demonstrates that, in Germany, it is often non-Germans, often immigrant women, who take on the household caring work.²⁷ Accordingly, a full-commodification model, with care work taking place in the market, or to a lesser extent by the state, has adverse implications for many socially disadvantaged women. Dual earners in professional or managerial jobs may be able to pursue dual careers, together with family lives, but often only because household services are bought on the market, leading to 'polarization between women in societies'.²⁸

What is required are changes to workplace structures and the activities of fathers such that women *and* men, of all social classes and ethnicities, are able to enjoy time at home to care for their children. This is what Joan Williams means when she aims to 'democratize' access to domesticity and care work.²⁹ Fundamental to this aim are radical changes in the structures of the workplace, to make it more flexible and amenable to workers with caring responsibilities, and

21 For an analysis from the US, see Joan Williams, *Unbending Gender – Why Family and Work Conflict and What to Do About It* (Oxford: Oxford University Press, 2000), especially chapter 5.

22 As Bell Hooks wrote: 'Among many poorer Americans, liberation means the freedom of a mother to finally quit her job . . . Of course work for her has meant scrubbing floors or scouring toilets.' bell hooks, *Feminist Theory: From Margin to Centre* (Boston: South End Press, 1984), quoted in Williams, *Unbending Gender*, p. 153. In the UK context, Sylvia Walby has pointed out that an increase in paid employment does not necessarily improve the position of women in society. In particular, paid work may not lead to greater equality for women who are working class or from ethnic minorities who 'only have opportunities to gain relatively poor forms of employment': *Gender Transformations* (London: Routledge, 1997), p. 23.

23 See further Dina Vaïou, 'Women's Work and Everyday Life in Southern Europe in the Context of European Integration' in Maria Dolores Garcia-Ramon and Janice Monk (eds.), *Women of the European Union – The Politics of Work and Daily Life* (London: Routledge, 1996), pp. 61–73.

24 Maria Rerrich, 'Modernizing the Patriarchal Family in West Germany' (1996) 3 *European Journal of Women's Studies* 27–37.

25 Sue Yeandle argues that evidence from the UK suggests similar patterns: 'Women, Men and Non-Standard Employment: Breadwinning and Caregiving in Germany, Italy and the UK' in Rosemary Crompton (ed.), *Restructuring Gender Relations and Employment – The Decline of the Male Breadwinner* (Oxford: Oxford University Press, 1999), pp. 80–104 at p. 95.

26 Yeandle, 'Women, Men and Non-Standard Employment', 103.

27 Rerrich, 'Modernizing the Patriarchal Family'.

28 Yeandle, 'Women, Men and Non-Standard Employment', 95.

29 Williams, *Unbending Gender*, p. 174.

in public services, particularly the provision of childcare and other caring services.³⁰ Feminist critiques of the structure and organisation of paid work are long-standing and focus on the dominance of a masculine norm of work. This is the norm of the 'ideal worker'³¹ who works full-time, is continuously employed until retirement, works long hours and who, therefore, has no family commitments. To a considerable extent, the workplace remains structured around this norm which excludes and/or places at a disadvantage all those who do not conform. Joan Williams argues that embedded in the norm of the 'ideal worker' is a norm of 'mothercare': that is, the assumption that care work is and should be carried out by women and that paid work can and should remain structured around this assumption. Williams convincingly argues that this norm of mothercare should become a norm of 'parental care', with the assumption that all parents have caring responsibilities which limit their availability.³² In time, this would encourage a move away from the norm of the 'ideal worker' and the assumption that the 'best' workers are those who work full-time continuously and who do not have parental responsibilities.³³ This would both facilitate time away from work, for those already in paid work, and encourage the further development of forms of work not based on the masculine norm of work, thus enabling others to enter the labour market.³⁴

But time for parental care is not sufficient on its own. Childcare support is required, not least if lone parents are to be able to benefit from paid work. Child and other care services are widely available in some member states, but rare in others and can be a significant barrier to access to labour markets and facilitating time away from paid work, particularly for lone parents.³⁵ Lack of childcare facilities also has adverse effects on women's opportunities to pursue activities other than paid work and on equality within families. In the words of the European Commission's Network on Childcare: 'Childcare is an issue of the labour force, of family policy, of children's and women's welfare – as well as being an issue of equality.'³⁶ The public provision of care is important here; a governmental role

³⁰ See further, Fredman, *Women and the Law*, especially pp. 206–44.

³¹ Williams, *Unbending Gender*, chapter 3.

³² Williams, *Unbending Gender*, p. 52.

³³ Williams, *Unbending Gender*, p. 55.

³⁴ See also Fredman, *Women and the Law*, p. 207, who argues that what is required is a social recognition of the value of parenting which in turn determines how labour markets are structured.

³⁵ For an analysis of the nature of and support for family obligations in the member states, see Jane Millar and Andrea Warman, *Family Obligations in Europe* (London: Family Policy Studies Centre, 1996); European Commission Childcare Network, *Leave Arrangements for Workers with Children* (Brussels: European Commission, 1994). See also Heather Joshi and Hugh Davies, *Childcare and Mothers' Lifetime Earnings – Some European Contrasts* (Discussion Paper No. 600) (London: Centre for Economic Policy Research, 1991) who demonstrate the strong correlation between mothers' participation in the labour market and the availability of childcare, discussed in Fredman, *Women and the Law*, p. 215.

³⁶ European Commission Childcare Network, *Childcare in the European Community 1985–1990* (Brussels: European Commission – Women of Europe Supplement, No. 31, August 1990), p. 2.

being vital due to the importance of its availability, quality and regulation.³⁷ In addition, a model of marketised care may achieve little for poorer women who are unable to avail themselves of market care, usually due to its high price; nor does the present structure of the workplace enable them to participate fully in caring. Further, without a formal public care service, care may become (remain) devalued and marginal, and workers more likely to be exploited. Although a widespread public care service may indeed lead to the 'universalisation of a female service economy',³⁸ as in some of the Nordic states, it remains less likely to lead to class closure where care and other household services are marketised and only then available to the middle and upper classes.

Facilitating equal parenting requires changes not only in the labour market and childcare services, but also in the behaviour and activities of men, particularly as fathers. Thus, change is required in the private sphere of the home and family. This is not a new argument. In 1978, Nancy Chodorow stated emphatically: 'It is politically and socially important to confront the organization of parenting.'³⁹ Care of children, she continued, should take place in 'group situations' and, were this to happen, children 'could be dependent from the outset on people of both genders.'⁴⁰ Chodorow's thesis was that cultural assumptions about women and men, the reproduction of gender, were achieved through parenting by women only. In a society in which both women and men cared for children, her hope was that this would radically transform all aspects of society. Thus, her purpose was to eliminate gendered assumptions and roles in society through changing parenting.

However, for many, a singular focus on sharing care within families was and remains extremely problematic. Denise Riley has argued that the principal problem with shared parenting is that it looks solely to the private sphere of the family for change.⁴¹ Emphasis shifts from the public domain of the workplace and provision of childcare, to the private realm of relationships and the negotiation of family roles. Shared childcare, she argued, 'rests on private goodwill; but private goodwill cannot be relied on to sustain a whole politics.'⁴² In particular, her concern is that shared parenting assumes an egalitarianism within families which is generally absent. Parents may begin their parenting with unequal access to work and money, and this is an imbalance which may be exploited in any later

37 As recommended by the Childcare Network, *ibid.*, p. 4.

38 Anneke van Doorne-Huiskes, 'Work-Family Arrangements: The Role of the State Versus the Role of the Private Sector' in Susan Baker and Anneke van Doorne-Huiskes (eds.), *Women and Public Policy – The Shifting Boundaries between the Public and the Private Spheres* (Aldershot, 1999), at p. 100.

39 Nancy Chodorow, *The Reproduction of Mothering, Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978), pp. 214–17.

40 *Ibid.*, pp. 214–17. See also Shulamith Firestone, *The Dialectic of Sex* (London: Paladin, 1972).

41 Denise Riley, "'The Serious Burdens of Love?'" Some Questions on Child-Care, Feminism and Socialism' in Lynne Segal (ed.), *What Is to Be Done About the Family? Crisis in the Eighties* (London: Penguin, 1983), pp. 129–56, reprinted in Anne Phillips (ed.), *Feminism and Equality* (Oxford: Blackwell, 1987), pp. 176–97.

42 *Ibid.*, p. 196.

collapse of the goodwill which sustained the original sharing, or when the relationship breaks down. In either breakdown scenario, 'the structures of public inequality emerge harshly'⁴³ in terms of access to paid work, to public childcare and to financial and personal security on divorce. Equally, the ideal of shared parenting has nothing to say where there is no pair to share the care. That is, the single parent and others 'whose lives do not encompass potential sharers in the upbringing of children' are excluded and ignored from this vision and their needs forgotten.⁴⁴ Similarly, Martha Fineman has argued that the focus on equal parenting, and egalitarianism post-divorce, means that families not including both parents are demonised. She continues that this 'stigmatising process makes mothering outside the context of a two-parent, traditional family susceptible to extensive legal regulation and supervision'.⁴⁵ In other words, the privatisation of 'the family' prevails, and traditional norms about families and family life are in danger of being reproduced.

Increased public provision of childcare is clearly required to facilitate the reconciliation of professional and family lives, not least because not all parents can share care, but also because all parents need care support services. However, the focus must not be on public services at the expense of change in homes and families, as this could otherwise have the effect of reinforcing women's role as primary childcarers, as discussed above. Jan Windebank has demonstrated that, although social policy measures designed to facilitate paid work and family life can make some differences to some women's lives, this is generally in the form of a redistribution of work amongst women.⁴⁶ Thus, the ability of some mothers to move beyond traditional mothering roles relies on other women who are not in such an advantageous position. Changes are therefore required in families. It is only when change impacts on the private, as well as on the public, that radical transformations may come about. And this is particularly the case in the context of the EU.

As will be seen below, at the Union level, there is an over-emphasis on the public, losing sight of the personal, private aspect of parenthood. Demands for changes in the patterns of work are the meat and drink of Union discussions; a rhetoric which is acceptable and welcomed. Though to a lesser extent, even discussion regarding extending and developing childcare provision is a legitimate Union debate. The personal behaviour of men, and parents, however, is another matter. Though there are references to men's childcare patterns and responsibilities in Union law and policy, in effect the private is eschewed in favour of debate

43 Riley, 'The Serious Burdens of Love?', 195.

44 Riley, 'The Serious Burdens of Love?', 194.

45 Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1995), p. 68.

46 Jan Windebank, 'To What Extent Can Social Policy Challenge the Dominant Ideology of Mothering? A Cross-National Comparison of Sweden, France and Britain' (1996) 6 *Journal of European Social Policy* 147-61 at 160.

regarding the public sphere. In the Union context, the private dimension of change has been lost; it must be reclaimed, albeit not at the expense of the debate regarding the need for reform in the public sphere. Equal parenting, with its emphasis on the private and familial, is therefore an essential part of seeking to ensure more gender neutral parenting policies within the Union.

4.1.4 Parenthood and the new ideals of family practices

We can see the links, therefore, between the concepts of gender neutrality and equal parenting and the new ideals of family practices put forward by Giddens and by Beck and Beck-Gernsheim.⁴⁷ As will be remembered, these writers suggest that new family practices are emerging based on the ideals of equality, democracy and negotiation. Discrimination, on the grounds of sex or sexual orientation, has no place in these new ways of thinking about families, nor do prescribed forms of families and familial roles. Applying such ideas to parenthood, parenting should be based on equality, on democracy within families and on parental roles being negotiated and not based on some pre-ordained gendered division of roles and competences. It means an end to the dominance of parenting based on heterosexual family practices or on the gendered role of 'mother' or 'father'. Further, as no form of family life is prescribed, there is no presumption about two-parent families, with no consequent stigmatisation of single parents.

Nonetheless, it must not be assumed that a move towards gender neutral parenting practices is likely to be a smooth one, or that there are no objections to how some aspects of gender neutral parenting may be realised in practice. Most importantly, it is essential to recognise that what is described above is an ideal. While Giddens and Beck and Beck-Gernsheim put forward their ideas as descriptions of current changes in relationships, as discussed in chapter 2, they are more appropriately thought of as normative ideals, with reality yet to live up to such visions. Equally, the ideals of gender neutral parenthood and equal parenting are largely ideals, with everyday practice falling far behind. This disjuncture between ideals and practice does give rise to considerable problems.

This is particularly the case in parenting post-divorce. Whereas the negotiation of paid work and family life discussed above is not without its critiques, in the case of post-divorce parenting, changes are being sought in a context of conflict and considerable change. Thus, while gender neutral parenting in this context may be desirable, as Shelley Day Sclater and Candida Yates argue, it may in fact create a 'new opportunity for the expression of the old patriarchal powers'.⁴⁸ Their argument is that the rhetoric of gender neutrality in fact masks the colonisation by fathers of the traditional terrain of mothers, with little change in men's attitudes and activities in relation to the care of children, and consequently

47 See the discussion in chapter 2.

48 Shelley Day Sclater and Candida Yates, 'The Psycho-Politics of Post-Divorce Parenting' in Bainham, Sclater and Richards (eds.), *What Is a Parent?*, pp. 271–94 at p. 289.

increasing men's claims and 'rights', without the consequent positive changes for women.⁴⁹ Sclater and Yates argue that only when women obtain full substantive equality with men, and men recognise their own vulnerabilities, 'will the ground-work be laid for parenting to become truly gender neutral'.⁵⁰ Thus, considerable change is required – political, cultural and psychic – before the opportunity for real gender neutral parenting can arise, if indeed (as they query) it is in fact desirable.

Such concerns are borne out by empirical research in the UK which has shown that the policy and legal goals of equal parenting post-divorce are determining parents' relationships with their children.⁵¹ The most significant impact of these goals is on fathers' relationships which have generally, prior to divorce, been mediated through the mother and thus there has not been an 'independent' relationship between the children and the father. Post-divorce, the mediating role of the mother diminishes or ceases and fathers, if they are to continue contact, must establish a new relationship with both the children and the mother. However, while society, in the form of legal and social policy and the courts, supports the father's new role as active father, little support or help is afforded to mothers. Thus, we have a situation where, post-divorce, equal parenting is promoted as the ideal and is supported in a myriad of ways; pre-divorce, in the 'intact' family, little or no support is given to equal parenting. On divorce, therefore, mothers commonly find themselves without the labour market skills or economic foundation necessary to support their lives as co-parents.

Accordingly, while equal parenting post-divorce remains an ideal, where it is not supported by equal parenting pre-divorce considerable hardship results, predominantly for women who were primary carers. They no longer have the role of primary carer, although even in the 'equal parenting' ideal post-divorce the final responsibility often rests with mothers,⁵² yet they do not have the cultural or economic capital to benefit from this new independence and have little autonomy or choices. As Carol Smart notes, 'the current priority given by family law to children and to fathers after divorce does nothing to help the transition mothers have to make towards being treated as fully fledged citizens'.⁵³ Ultimately, therefore, the 'active pursuit – by family law – of equal, joint parenting *after* divorce combined with welfare and employment policies which make equal, joint parenting *during* marriage virtually impossible for the majority, gives rise to a form of disenfranchisement of motherhood rather than a new beginning for parenthood'.⁵⁴

49 See also Carol Smart and Bren Neale, *Family Fragments?* (Cambridge: Polity Press, 1999).

50 Sclater and Yates, 'The Psycho-Politics of Post-Divorce Parenting', 289.

51 Smart and Neale, *Family Fragments?*. See also Carol Smart, 'The "New" Parenthood: Fathers and Mothers after Divorce' in Elizabeth Silva and Carol Smart (eds.), *The New Family?* (London: Sage, 1999), pp. 100–14.

52 Smart and Neale, *Family Fragments?*. See also Smart, 'The "New" Parenthood'.

53 Smart, 'The "New" Parenthood', 113.

54 Smart, 'The "New" Parenthood', 113.

Thus, while the reality of family practices does not yet match the ideals of gender neutral parenting, or of the legitimacy of diverse family practices, this does not mean that ambitions should be changed. The ideal of gender neutrality remains valid and must be the focus for law and policy, with careful attention being paid to the real situation of women and men while change is taking place. It is perhaps important, therefore, to see gender neutral parenting as a long-term strategy which may reap rewards in the longer term in terms of relationships between women and men, and parents and children. Such ideological shifts take time and the process of change is never easy. Sociologists Beck and Beck-Gernsheim have argued that, as the male breadwinner model of family life was one of the cornerstones of industrial society, it will not be transcended without conflict, over jobs, the domestic division of labour, childcaring and childrearing. In seeking change, they predict a 'long and bitter battle'.⁵⁵ At the European level, this is ever more so. The lowest common denominator, which pervades all policy making at the Union level, contributes to the continuation of outdated assumptions and ideologies about parenting. At best, small incremental steps can be taken which represent inroads into this dominant ideology, with the hope of changing the wider picture in the longer term.

4.1.5 Parenthood and children

What must also be remembered in this discussion of the organisation of parenting is the needs and desires of children. As Allison James has argued, there is a paucity of knowledge about what children think of parenting or family life in general, added to which there is an assumption that children are the passive recipients of 'parenting', a view which places parenting as essentially 'adult-centric'.⁵⁶ This view of parenting, as something which is 'done' to children, takes little account of children's own subjectivity and regards children as fundamentally vulnerable, dependent and in need of protection.⁵⁷ Furthermore, the discourse on reconciliation of professional and family life tends to see children as objects and obstacles, rather than as subjects in their own right with their own needs and expectations.⁵⁸

In the absence of knowledge about children's experiences, policy prescriptions must be carefully made. Arguably, the gender neutral parenting approach advanced above meets what might be the interests of children in seeking to

55 Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Cambridge: Polity Press, 1995), p. 14.

56 Allison James, 'Parents: A Children's Perspective' in Bainham, Sclater and Richards (eds.), *What Is a Parent?*, pp. 181–96 at pp. 181–3.

57 James, 'Parents: A Children's Perspective', 181–3.

58 For a discussion of the adult-centric view of reconciliation, see Helmut Wintersberger, 'Work Viewed from a Childhood Perspective' in *Family Observer No. 1* (Luxembourg: European Commission, 1999), pp. 18–24.

ensure that parents are able to spend time with their children, rather than being constrained by a workplace culture which affords them little time, and therefore energy, to care for their children.⁵⁹ Policies, therefore, which support equal parenting may, in some small way, be advanced on the basis that they support children's needs and expectations, as well as the wishes of parents. In addition, therefore, it is arguable that the pursuit of equal parenting meets the instruction of the European Union's Charter of Fundamental Rights to pursue the best interests of the child. In addition, in the event of family breakdown, it is possible that more active parenting by fathers, as well as mothers, will enable a child's rights, as set out in the Charter, to maintain access to and contact with both parents, more likely to be fulfilled. But this does not detract from a recognition of the radical rethinking of our approaches to public policy and the organisation of working and family life which would be required for a truly child-centred approach.

Just as new ideas regarding parenthood are emerging, so are new understandings of children's relationships within families.⁶⁰ The ideals of family democracy have considerable implications for children, entailing their recognition as autonomous individuals. This has also affected parents' identities and expectations. Jane Ribbens found that these new concepts of children, of children as 'small people' as opposed to 'natural innocents' or 'little devils', while not common, are increasing and reveal new and different ways of conceptualising children's relationships with their mothers.⁶¹ There is, therefore, a 'less explicit ideology which lays down pre-determined guidelines as to how mothers and children should interact. This is because mother and child are construed as different individuals of equal standing, without reciprocal obligations centred on the dependency needs of childhood.'⁶² In this way, seeing the child as an individual, rather than a dependent element of the mother, leads to a relationship not based on the assumed 'naturalness' of motherhood or biological 'maternal bond'. Indeed, it creates a type of 'negotiated' relationship.⁶³ If children are 'small people', individuals to be treated as such, then mothers are more free to be individuals, rather than being bound by the natural, maternal bond. Ideas of fatherhood are also changing. Fathers' 'new' roles are, however, difficult to describe, being uncertain and ambiguous. Empirical evidence demonstrates that, as well as the role of

⁵⁹ Even though parenting, as experienced by children, is often not gender neutral. Allison James discusses how, for children, the generalised concept of 'parent' or 'parenting' may have little meaning because for a child, his or her parents are regarded as gender specific, 'my mum' or 'my dad'. See James, 'Parents: A Children's Perspective', 190.

⁶⁰ See further chapter 3.

⁶¹ Jane Ribbens, 'Mothers' Images of Children and Their Implication for Material Response' in Julia Brannen and Margaret O'Brien (eds.), *Childhood and Parenthood* (Institute of Education, University of London, 1995), discussed in Alison Diduck, *Law's Families* (London: Butterworths, 2003), pp. 87–8.

⁶² Ribbens, 'Mothers' Images of Children', 72, discussed in Diduck, *Law's Families*, pp. 87–8.

⁶³ Diduck, *Law's Families*, p. 88.

fathers as 'providers', there is the expectation that fathers will 'be there' for their children, even though it was not clear what this meant.⁶⁴

Nonetheless, there remain clear gendered divisions in the expectations of mothers and fathers discovered in this empirical evidence. Although the different expectations are not those of the traditional family, elements of such thinking remain. But, at the same time, the rhetoric of egalitarianism is emerging. The ideals, therefore, of egalitarianism and democracy are not yet being met in practice, but are being expressed as ideals – ideals which impact not just on parents' relationships vis-à-vis each other, but also in relation to their children.

4.1.6 A way forward

In conclusion, therefore, the 'dominant ideology of the family', with its normative prescriptions for family life and familial roles, must be eradicated from European Union law and policy. It must be replaced, in the context of parenthood, with a more modern, gender neutral approach, based on equal parenting and respect for the needs and rights of children. While such an ideal does not yet match reality, it is important that this remain the aim of law and policy. This is imperative if women are to be free to exercise choice in their lives, if men are to be released from their current strait-jackets of marketised automaton and principal breadwinner and if children are to be allowed to enjoy time with their parents.

4.2 Parenthood through the lens of sex equality law

It was through the Union's sex equality laws that its approach to parenthood was first developed. This section, therefore, investigates the institutional and judicial approach to parenthood, as played out in the field of sex equality law. It will be seen that there is a considerable disjuncture between the rhetoric employed at the institutional level regarding policies on the reconciliation of paid work and family life, which expresses commitment to equal parenting, and the jurisprudence of the Court of Justice, which reproduces traditional understandings of parenthood based on the dominant ideologies of motherhood and fatherhood.

4.2.1 The rhetoric of equal parenting: legislative and policy initiatives

Turning first to the positive aspects of the Union's approach and its policies on the reconciliation of paid work and family life, there is indeed much for an advocate of equal parenting to be pleased about.⁶⁵ Successive equal opportunity action

⁶⁴ Jo Warin, Yvette Solomon, Charlie Lewis and Wendy Langford, *Fathers, Work and Family Life* (London: Family Policy Studies Centre, Joseph Rowntree Foundation, 1999), discussed in Ribbens, 'Mothers' Images of Children' and in Diduck, *Law's Families*, pp. 88–9.

⁶⁵ See further: Clare McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 *Columbia Journal of European Law* 241–72; Eugenia Caracciolo, 'The "Family-Friendly" Workplace: The EC Position' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 325–44.

programmes have emphasised the importance of reconciliation and the need for change within families if that policy is to be effective. As long ago as 1989, the Social Charter included the non-binding commitment to enable 'men and women to reconcile their occupational and family obligations'.⁶⁶ Then, in 1992, the Recommendation on Childcare was adopted.⁶⁷ Although non-binding, it did represent a symbolic achievement, that being to 'encourage initiatives to enable women and men to reconcile their occupational, family and upbringing responsibilities arising from the care of children'.⁶⁸ One of the four key themes of the Recommendation was the need for measures to 'promote and encourage, with due respect for freedom of the individual, increased participation by men, in order to achieve a more equal sharing of parental responsibilities between men and women and to enable women to have a more effective role in the labour market'.⁶⁹ Peter Moss noted that this statement 'place[d] a clear commitment on member states to address the current unequal division of care and other family responsibilities' and was a 'formal recognition' at European level of the significance of the domestic division of labour.⁷⁰ Catherine Hoskyns equally welcomed the Recommendation, noting that it was the 'first EC equality measure actively to target male behaviour'.⁷¹

The promotion of gender neutral and equal parenting appeared, therefore, to be firmly on the Community agenda. The adoption of the Parental Leave Directive in 1996 seemed to set the seal on this approach.⁷² The Directive, in providing for a twelve-week period of leave for mothers and fathers, is gender neutral in its treatment of parents. Furthermore, the Directive provides that the rights should be, in principle, non-transferable between parents, with the aim of ensuring a higher take-up by men. Finally, the Directive expresses the desire that 'men should be encouraged to assume an equal share of family responsibilities'. Similarly in 2000, the Council resolution on the balanced participation of women and men in family and working life declared that the 'de facto equality of men and women in the public and private domains' is a necessary condition for democracy. Furthermore, the resolution stated that both 'men and women,

66 Catherine Hoskyns notes that this 'commitment' was included at a 'fairly late date' in the negotiation and drafting of the Charter: *Integrating Gender – Women, Law and Politics in the European Union* (London: Verso, 1996), p. 154.

67 Council Recommendation on Childcare 92/241/EEC, OJ 1992 L 123/16.

68 *Ibid.*, Article 1.

69 *Ibid.*, Articles 3–6.

70 Peter Moss, 'Reconciling Employment and Family Responsibilities: A European Perspective' in Suzan Lewis and Jeremy Lewis (eds.), *The Work–Family Challenge* (London: Sage, 1996), pp. 20–33 at p. 25.

71 Hoskyns, *Integrating Gender*, p. 157.

72 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4, as extended to the UK by Council Directive 97/75/EC, OJ 1998 L 10/24. For an analysis of the legislative process leading up to the adoption of the Directive, see Marlene Schmidt, 'Parental Leave: Contested Procedure, Creditable Results' (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 113–26.

without discrimination on the grounds of sex, have a right to reconcile family and working life'.⁷³

The rhetoric seems clear: equal parenting and an equal sharing of family work is the ambition of Community policy. The rhetoric appears to be supported by legislative action in the form of the Recommendation on Childcare and the Parental Leave Directive. However, beneath the rhetoric there is a far from dedicated commitment to equal parenting. Ultimately, the reconciliation policy is a means to an end. The end is the increased labour market participation of women, not equality in the home and more egalitarian family practices. Although the former may help assist the latter, that is not a foregone conclusion. Thus, at the same time that the rhetoric considered above was proclaiming a commitment to equal parenting, the same policy documents also emphasise what might be said to be the real agenda, that of increasing the labour market participation of women. Thus, the Commission, in its third equal opportunities action programme, stated that reconciliation was necessary to 'reduce the barriers to access to and participation in the labour market by women'.⁷⁴ Increased women's employment would help to 'reflate' local economies by, among other things, 'new demands on transport' and 'consumption of childcare'. The Commission stated that the reconciliation policy was necessary to 'harness the economic potential of women' and to meet their 'desire to enter or re-enter the labour market'.⁷⁵ Although in its implementation of the programme the Commission sponsored and developed many projects examining gender roles and men as carers, all of which are essential and welcome, such efforts were marginal to the main ambition of increasing women's labour market participation.

This emphasis on the labour market was confirmed with the inclusion of reconciliation as an essential element in the Union's employment policy, with the Commission stating that '[i]ncreasing female participation on the labour market, in view of impending demographic change, is an important objective of the European Employment Strategy'.⁷⁶ To this end, one of the original four pillars of the employment strategy was equal opportunities, an aspect of which was reconciliation. All references to reconciliation include women and men, but the *real* agenda is that reconciliation is a *woman's* problem and one that inhibits

73 Resolution of the Council and of the Ministers for Employment and Social Policy of 6 June 2000 on the Balanced Participation of Women and Men in Family and Working Life, Press Release No. 8980/00.

74 Council Resolution of 21 May 1991 on the third medium-term Community action programme on equal opportunities for women and men (1991–1995), OJ 1991 C. 142/1. See also the Report from the Commission COM (95) 246 final, Equal Opportunities for Women and Men – Third Community Action Programme 1991–1995, p. 38.

75 Interim report of the Commission on the Implementation of the Medium-Term Community Action Programme on Equal Opportunities for Men and Women (1996 to 2000), COM (98) 770 final, p. 20.

76 Communication from the Commission COM (99) 347 final, A Concerted Strategy for Modernising Social Protection, p. 10.

increased labour market participation. Thus, the 1999 and 2000 Employment Guidelines stated that '*women* still have particular problems in . . . reconciling professional and family life'.⁷⁷ The 2003 Guidelines emphasise the need to increase the labour market participation of women, with particular targets set, and stress that particular attention must be given to 'reconciling work and private life' including the 'encouraging of sharing family and professional responsibilities'.⁷⁸ The Commission's explanatory document is even more explicit, highlighting the need to facilitate the participation of 'mothers with small children'.⁷⁹

This approach is confirmed in the Commission's recent Communication on demographic change, which states that, to compensate for the predicted fall in the working age population, the 'Union advocates greater employment participation, particularly by women and older people'.⁸⁰ Furthermore, the Communication states that families must be encouraged to have more children through the enhancement of public policy 'incentives' such as family benefits, parental leave and childcare which, it claims, have been demonstrated to have a 'positive impact on the birth rates to increase employment, especially female employment'.⁸¹ While the Communication does talk about the need to 'reconcile family life and work' for women and men, again it can be seen that the thrust of the argument is on increasing the birth rate *and* women's employment participation.

Viewed from this perspective, the last thing that is recommended is the withdrawal of men from the labour market to care for children. This would not solve the 'problem' which is the anticipated reduction in the working population due to the reduction in birth rates. Equally, the limited role which many fathers currently play in family life is not considered problematic per se and in need of transformation. Accordingly, it seems that the suggested changes in workplace structures are focused on women, which is simply a false panacea which enables a more basic change in the relations between women and men to be avoided. The point, therefore, is that, while the Commission does state that more favourable conditions are required for women *and* men to enter, re-enter and remain in the labour market, which include an 'equal share of care and household responsibilities' and an 'encouraged take-up of parental and other leave schemes by men', for so long as the focus is principally on the labour

77 Draft Council Resolution of 16 December 1998, quoted in Annual Report from the Commission on Equal Opportunities 1998, COM (99) 106 final, p. 14; Proposal for Guidelines for Member States' Employment Policies 2000, COM (99) 441, p. 10.

78 Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of Member States, OJ 2003 L 197/13, para. 6.

79 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The Future of the European Employment Strategy (EES), COM (2003) 6 final, para. 2.2.9.

80 Communication from the Commission COM (2005) 94 final, Green Paper – Confronting Demographic Change: A New Solidarity between Generations, p. 3.

81 *Ibid.*, p. 5.

market participation of women, these suggestions are little more than cheap talk.⁸²

In other words, while the increased participation of women in the labour force is important, serious concerns arise when the focus is solely on women's entry into the workforce. Without concomitant changes in the structure of family and household work, an increase in women's labour participation would simply add to women's existing responsibilities, creating and/or making worse women's 'double shift'. This situation has the likely effect of reproducing the very discrimination which an equal parenting policy might have originally tried to eliminate. In the short term, the increase in labour market participation will assist some women, facilitating their wish to participate in the labour market as well as continuing their caring responsibilities. However, in the longer term, it simply entrenches women's responsibilities within families, by confirming assumptions that such obligations are women's only, while doing little to change the marginalisation of women's paid work.⁸³

Finally, although the Parental Leave Directive was highly symbolic in its grant of rights to mothers *and* fathers, it was ultimately a damp squib. There was no provision for paid leave and thus the Directive only required changes in a small number of member states. Similarly, the amended Equal Treatment Directive, while recognising the importance of paternity leave, simply promotes it as an option for member states to consider.⁸⁴ In contrast, the Pregnancy and Maternity Directive⁸⁵ provides for a minimum of fourteen weeks' paid leave, together with significant protection from discrimination. While maternity leave is essential, if not complemented by changes in the practices of men it simply cements women's relationship to the home.⁸⁶ And a directive which details considerable rights and entitlements for women on the birth of a child, but does not address men as fathers, is almost certainly likely to reproduce traditional approaches to

82 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The Future of the European Employment Strategy (EES), COM (2003) 6 final, para. 2.2.9.

83 There is a further danger of a strong link between women's equality and (un)employment in that, in times of high unemployment, women could be encouraged to leave the workplace, to (re)turn to caring duties. Their position as paid workers is therefore rendered marginal and dependent on the vagaries of the changing economic situation and labour market policies. Indeed, Jeanne Fagnani has argued that family policy has been used as a means of reducing unemployment: 'Recent Changes in Family Policy in France' in Eileen Drew, Ruth Emerek and Evelyn Mahon (eds.), *Women, Work and the Family in Europe* (London: Routledge, 1998), pp. 58–65 at p. 58.

84 Preamble (para. 13) to and Article 2(7) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L 269/15.

85 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ 1992 L 348/1.

86 Melissa Benn, *Madonna and Child – Towards a New Politics of Motherhood* (London: Jonathan Cape, 1998), p. 70.

parenthood. Although there is a need to be sex specific when considering pregnancy, this should not extend to rights post-birth which should be gender neutral. Accordingly, although the Directive brought an immediate improvement to the workplace rights of many women, its longer term consequences are problematic. In this way, Patrizia Romito has argued that, although such policies will seem to many women like the lifeline which keeps them afloat, they are in fact 'measures which rationalize the exploitation of the work mothers do both inside and outside the family'.⁸⁷

Unfortunately, the Charter of Fundamental Rights simply reproduces the existing position in Community law, rather than attempting to map a more progressive approach to reconciliation and parenthood. Article 33(2) of the Charter states that: 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.' It can be seen that this carefully crafted provision simply restates existing entitlements under the Pregnancy and Maternity Directive and the Parental Leave Directive. In particular, the omission of a reference to 'paid' parental leave is most notable. This provision, while recognising parenthood as distinct from marriage or a particular form of family life, does however reinforce a hierarchical gendered preference for motherhood over fatherhood, via the provision of paid maternity leave, followed only by (unpaid) parental leave and no provision for paternity leave.⁸⁸ Moreover, this 'right' is contained in the title on employment rights, not the title on equality. Its development, if there is to be any, will be bedevilled by the same problems identified above in pursuing reconciliation through an employment policy.

Faced with a challenge to existing Community provisions on reconciliation, it seems that there is little in this Article which an advocate general or the Court could use to develop and enhance the law. This inadequacy is all the more striking in view of an earlier draft which began with the bold statement: 'Everyone shall have the right to reconcile their family and professional lives.'⁸⁹ The grant of a 'right to reconciliation' may have had potentially far-reaching consequences. It could have been developed to cover not only paid parental leave, but also a wide range of policies which impact on the (im)balance between paid work and family lives, not least childcare and flexible working practices.

⁸⁷ Patrizia Romito, "'Damned If You Do and Damned If You Don't': Psychological and Social Constraints on Motherhood in Contemporary Europe' in Anne Oakley and Juliet Mitchell (eds.), *Who's Afraid of Feminism? Seeing Through the Backlash* (London: Hamish Hamilton, 1997), pp. 162–86 at p. 183.

⁸⁸ For a contrary interpretation, see Marzia Barbera, 'The Unsolved Conflict: Reshaping Family Work and Market Work in the EU Legal Order' in Tamara Hervey and Jeff Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford: Hart Publishing, 2003), pp. 139–60 at p. 142.

⁸⁹ Charte 4422/00, 28 July 2000, Article 31.

This earlier draft of the Charter did go on to qualify the 'right to reconciliation' by stating that the right 'includes in particular the right to protection from dismissal because of pregnancy and the right to paid maternity leave and to parental leave following the birth or adoption of a child'. It is, however, the words 'in particular' which would have been crucial: such words do not limit the scope of the right, but give examples of the possible manifestations of the right. Had this provision on reconciliation been included in the final text of the Charter, it is possible that the Court of Justice could have used it to develop a broad and progressive interpretation of the 'right to reconciliation'. As things stand, the final text of the Charter is limited and inadequate and is therefore unlikely to bring about any significant changes to the existing reconciliation policy.

Perhaps, however, a creative court could make use of Article 23 of the Charter, to be found in the equality chapter, which states that: 'Equality between men and women must be ensured in all areas, including employment, work and pay.' Is it possible that this could be interpreted broadly to include, for example, equality of parenting? The provision states that equality is to be included in 'all' areas, including those relating to the workplace, but not limited thereto. Therefore, although earlier jurisprudence of the Court suggests that, in terms of relations between women and men within the home and family, the preference is for the traditional sexual division of labour, perhaps the Court could be persuaded that this provision, in combination with the many statements of the Commission and Parliament in a similar vein, suggests that relations between women and men should be modernised and equalised.⁹⁰ However, in view of the Court's approach, further discussed below, this seems unlikely. Another potentiality is the general non-discrimination provision in Article 21. Marzia Barbera argues that this provision may provide the Court of Justice with the institutional capacity and competence to expand reconciliation rights beyond those found in Article 33, including the 'unequal distribution of discretionally attributed benefits, such as parental leave paid only to women workers and not to men workers as well'.⁹¹ One final possibility is Article 24 on the rights of the child, which Cathryn Costello argues could facilitate a more gender neutral approach to parenting as it would be difficult to justify measures on the basis of the sex of parents, rather than on the best interests of the child.⁹²

Generally, however, it is here, in the Charter, that the gap between the rhetoric and the reality of Union policy is clearest. The Council adopted its forward-thinking

90 It might even be that 'work' could be interpreted to include unpaid work in the home, albeit that this is again unlikely in view of the Court's existing jurisprudence. In the area of free movement of workers, the Court has rejected arguments that unpaid work in the home might constitute 'work' for the purposes of Community entitlements. See further Isabella Moebius and Erika Szyzszak, 'Of Raising Pigs and Children' (1998) 18 *Yearbook of European Law* 125–56.

91 Barbera, 'The Unsolved Conflict', 153.

92 Cathryn Costello, 'Gender Equalities and the Charter of Fundamental Rights of the European Union' in Hervey and Kenner (eds.), *Economic and Social Rights*, pp. 111–38 at pp. 126–8.

resolution on the balanced participation of women and men in public and private lives in mid-2000, with its somewhat radical policy proposals and commitment to equal parenting and a right to reconciliation. Later that year, however, the Charter of Fundamental Rights was adopted which bears little resemblance to the resolution and which will effectively restrict future opportunities and reinforce the status quo. A resolution is cheap talk: whereas it appears to be too much of a risk to include progressive proposals and statements in a (non-binding) Charter of Fundamental Rights. Rhetoric and reality could not be further apart.

4.2.2 The Court of Justice and the reproduction of traditional ideologies of motherhood and fatherhood

In the policy and legislative field, discussed above, measures which have been taken in the name of gender neutral parenthood are often merely exhortatory and generally require little or no action at member state level. Nonetheless, there are some moves towards equal parenting, and the rhetoric, at least, is moving in the right direction. In the jurisprudence of the Court of Justice even the positive rhetoric is largely absent. As discussed below, the Court of Justice has been reproducing a traditional ideology of motherhood, and parenthood, which owes little to the ideas of equal parenting. Although lip-service has been paid to the Union's policy objectives regarding the reconciliation of paid work and family life, this has yet to manifest itself in concrete decisions.

An explanation for this divergent approach is not easy to find. Perhaps the conservative nature of legal reasoning and precedent, the absence of dissenting opinions and the pressure of case loads, combined with the isolated disciplinary nature of judicial decision-making, account for the differences.⁹³ In addition, rhetoric is cheap. The Union institutions can afford to make bold claims, without there being many real consequences. On the contrary, the Court's judgments can have wide-ranging cultural and economic effects, which the Court is perhaps rightly shy of precipitating, particularly in a political climate of contested legitimacy of the Union. Notwithstanding such constraints on its activities, it is my argument that the Court should be exercising its interpretative power in a more progressive manner; in a way which is consistent with its own oft-stated commitment to equality between women and men and which reflects the principles of gender neutral and equal parenting.

The foundation of the Court's jurisprudence can be traced back to the *Commission v. Italy* and *Hofmann* cases of the mid-1980s.⁹⁴ The Court held in *Commission v. Italy* that Italian legislation which granted only women a right to

⁹³ See further Giuseppe Federico Mancini and Siofra O'Leary, 'The New Frontiers of Sex Equality Law in the European Union' (1999) 24 *European Law Review* 331–53; and Siofra O'Leary, *Employment Law at the Court of Justice – Judicial Structures, Policies and Processes* (Oxford: Hart Publishing, 2002).

⁹⁴ Case 163/82, *Commission v. Italy* [1983] ECR 3273; [1984] 3 CMLR 169; Case 184/83, *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047; [1986] 1 CMLR 242.

leave on the adoption of a child was not contrary to the Community's Equal Treatment Directive.⁹⁵ The Court held that the Italian government had been motivated by a 'legitimate concern' which led it 'rightly' to introduce legislation attempting to assimilate the entry of adoptive and biological children into the family, especially during the 'very delicate initial period'.⁹⁶ Underpinning this judgment was a belief that different treatment on account of motherhood (and not biological differences regarding the capacity to give birth) does not constitute unlawful discrimination. In so holding, the Court reinforced the sexual division of labour in which childcare is always the responsibility of mothers, ignoring any conception that the father may also have a legitimate need and/or desire for a period of leave. Fatherhood is thereby limited, by implication, to a breadwinning role, with the assumption that a father's primary commitment and identification should be with paid work, rather than childcare.⁹⁷

This approach was followed in *Hofmann* which involved a challenge to German legislation which provided that only women were entitled to an optional period of maternity leave which took effect eight weeks after birth. Hofmann, the father of a newly born baby, argued that this leave was for childcare purposes and should therefore be available to mothers and fathers.⁹⁸ The German government justified the policy on the ground that it had 'favourable repercussions in the sphere of family policy, inasmuch as it enable[d] the mother to devote herself to her child', free from the 'constraints' of employment.⁹⁹ The Court agreed, holding that Community law was not designed to settle questions relating to the 'organisation of the family', or to 'alter the division of responsibility between parents'.¹⁰⁰ The Court suggested, therefore, that Community law stands outside the sexual division of labour in the home, thus absolving Community law of any responsibility for the 'social organisation' of family life.¹⁰¹ However, in not intervening, the Court, and thereby Community law, effectively legitimated the status quo. The Court sanctioned legislation which helped ensure that women are, and should remain, primarily responsible for childcare.

95 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40.

96 *Commission v. Italy*, para. 16.

97 On the traditional conception of fatherhood and the part this plays in limiting opportunities for women, see Richard Collier, "Feminising" the Workplace? Law, the "Good Parent" and the "Problem of Men" in Anne Morris and Therese O'Donnell (eds.), *Feminist Perspectives on Employment Law* (London: Cavendish, 1999), pp. 161–81.

98 This view was supported by the fact that the second period of leave was withdrawn in the event of the death of the baby.

99 *Hofmann*, written observations to the Court, at p. 3061.

100 *Hofmann*, para. 24. A formula repeated in many subsequent cases: see, for example, Case C-345/89, *Re Stoeckel* [1991] ECR I-4047; [1993] 3 CMLR 673, para. 17.

101 This apparent neutrality was echoed in Case 170/84, *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607; [1986] 2 CMLR 701, para. 43, where the Court stated that employers, and Community law, did not have to take into account the 'difficulties faced by persons with family responsibilities' when establishing entitlement conditions for occupational pensions.

This is confirmed by the Court's justifications for granting leave to women only. It declared that it was 'legitimate to protect the special relationship between a woman and her child'.¹⁰² The language of the 'special relationship' inevitably recalls the discredited theories of mother–infant bonding in which the bonding of mother and child is seen as crucial to the future healthy development of the child and reinforces the 'notion that women's childcare obligations are "natural" and unchangeable'.¹⁰³ This is the 'special protection' of a particular conception of motherhood, one that perpetuates the assumption, based on the bonding research, that because 'women bear children they are therefore automatically the sex that is responsible for rearing them'.¹⁰⁴ The Court conceived, normatively, of a workplace in which only women take time off to care for children and was effectively encouraging 'women to stay at home with their children during the early months at least, while men continue with their uninterrupted careers'.¹⁰⁵

After much condemnation of *Hofmann* by feminist activists, scholars and many others, not least in Germany, it was thought that the Court's judgment in *Commission v. France* in 1986 signalled a change of direction.¹⁰⁶ In this case, the Court rendered unlawful a range of rights granted to French women which included leave when a child is ill, the grant of an additional day's holiday in respect of each child, granting time off work on Mother's Day and payments of allowances to mothers for childcare expenses.¹⁰⁷ The Court held that these rights were incompatible with the Equal Treatment Directive as they were entitlements which should be available to women and men. The Court continued that the rights breached the principle of equality as they granted women special rights in their capacity as parents, which is a category 'to which both men and women equally belong'.¹⁰⁸ The Advocate General continued that a 'father, in modern social conditions, may just as much be responsible for looking after sick children or need to pay childminders' and should therefore be entitled to the same rights.¹⁰⁹

The judgment in *Commission v. France* was greeted as heralding a sea-change in the Court's approach.¹¹⁰ The Court had rejected special rights granted to

¹⁰² *Hofmann*, para. 26. The concept of the 'special relationship' has been reiterated in many subsequent cases, most recently in Case C-342/01, *Merino Gómez v. Continental Industrias del Caucho SA* [2004] 2 CMLR 3.

¹⁰³ Fredman, *Women and the Law*, p. 195.

¹⁰⁴ Christopher Bovis and Christine Cnossen, 'Stereotyped Assumptions Versus Sex Equality: A Socio-Legal Analysis of the Equality Laws in the European Union' (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations* 7–23 at 19.

¹⁰⁵ Sandra Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 *Industrial Law Journal* 119–34 at 127.

¹⁰⁶ Case 312/86 [1988] ECR 6315; [1989] 1 CMLR 408.

¹⁰⁷ *Ibid.*, para. 8.

¹⁰⁸ *Ibid.*, para. 14.

¹⁰⁹ *Ibid.*, p. 6328.

¹¹⁰ For example, Cathryn Claussen suggested that, if Case 312/86, *Commission v. France* [1988] ECR 6315; [1989] 1 CMLR 408, is to be taken as an indication of how the Court will decide

mothers, arguing that parental rights should be available to women *and* men. Thus, by the late 1990s, with the reconciliation policy well established and the Parental Leave Directive¹¹¹ adopted, as well as the rapid increases in women's employment, it might have been thought that the traditional rendering of women's and men's roles within 'the family' would have given way to a more progressive and egalitarian response by the Court. Unfortunately, however, such optimism was misplaced and in *Abdoulaye, Hill and Stapleton, Lewen and Lommers* the Court has effectively reiterated its *Hofmann* jurisprudence.¹¹²

In *Abdoulaye*, the Court rejected a claim that a payment granted to women 'when taking maternity leave' constituted discrimination against men.¹¹³ The men had argued that this was a payment equivalent to a child allowance to which women and men should be equally entitled, as it was made on top of women's full salary and, where a child was adopted, a payment was made to mothers or fathers. The Court justified its position by arguing that women taking maternity leave were in a unique position which made comparison between their rights and the rights of women and men at work impossible.¹¹⁴ However, the appropriate comparison should have been women and men becoming parents and, as the Court stated in *Commission v. France*, this category applies to both women and men, and therefore they should both be entitled to equal rights.

The Court's ruling in *Abdoulaye* bears all the hallmarks of its earlier approach in *Hofmann* and its legitimization of the status quo. It sought to 'protect' women from having their existing rights diluted or removed. However, in doing so, it reinforced a traditional approach to women's responsibilities and capabilities. Although women may presently remain primarily responsible for childcare, the granting of rights to women to compensate therefor in fact entrenches their disadvantageous position. In effect, the Court's judgments reinforce the very discrimination that they are seeking to render unlawful. It is appropriate to ensure the continuation of women's employment rights whilst pregnant and giving birth, but such judicial enforcement should not extend beyond such biological and

similar issues in the future, it would 'represent a significant step forward': 'Incorporating Women's Reality into Legal Neutrality in the European Community: The Sex Segregation of Labor and the Work-Family Nexus' (1991) 22 *Law & Policy in International Business* 787-813 at 797.

111 Directive 96/34/EC, OJ 1996 L 145/4.

112 There are further cases which could be considered here, for example the Court's endorsement of a legislative prohibition on the night work of pregnant women: Case C-421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt* [1994] ECR I-1657; [1994] 2 CMLR 681, and its reiteration of the 'special relationship' justification in many pregnancy discrimination cases, for example, Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd* [1994] ECR I-3567; [1994] 2 CMLR 729, para. 20. See also Tamara Hervey and Jo Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' (1998) 8 *Journal of European Social Policy* 43-63.

113 Case C-218/98, *Abdoulaye v. Régie nationale des usines Renault SA* [1999] ECR I-5723; [2001] 2 CMLR 18. See further, Clare McGlynn, 'Pregnancy, Parenthood and the Court of Justice in *Abdoulaye*' (2000) 25 *European Law Review* 654-62.

114 In particular, the Court held that women suffer 'several occupational disadvantages inherent in taking maternity leave', para. 18, for which this payment is made in lawful compensation.

health requirements. Hence, the optional period of maternity leave in *Hofmann*, or the period of adoptive leave in *Commission v. Italy*, and, similarly, the payment in *Abdoulaye*, should not come within this field of protection. To do so, as these judgments have done, is to perpetuate stereotypes about the roles of mothers and fathers. To exclude men from a societal recognition of the significance (and financial expense) of the birth of a child perpetuates traditional assumptions that the birth and care of a child is a women's concern and responsibility. This not only does a disservice to women, ensuring the continuation of outdated assumptions about their familial and workplace roles, but means that men are not encouraged and facilitated in taking up new and expanding opportunities to play a significant role in the care and upbringing of their children.

The judgment in *Abdoulaye* confirmed that the Court's earlier ruling in *Hill and Stapleton* was not perhaps as progressive as it might have first appeared.¹¹⁵ In the context of considering potential justifications for indirectly discriminatory employment conditions, the Court had stated that it was Community policy to 'encourage and, if possible, adapt working conditions to family responsibilities'.¹¹⁶ It continued that such a policy aims to ensure the '[p]rotection of women within family life and in the course of their professional activities', adding that this was also the case for men.¹¹⁷ In many ways, this statement could be seen as progressive and a move away from the *Hofmann* approach. It does recognise a familial dimension to equality law and refers to the need for measures to facilitate a reconciliation of paid work and family life.¹¹⁸ However, the Court implies the need to adapt working conditions to family responsibilities, that is, to meet existing responsibilities: not that family responsibilities need to change in order to liberate women and men. Thus, the Court appears to assume a static position regarding family responsibilities and seeks to adapt working conditions to meet that reality. Although this does constitute a belated recognition of the need for some change, it is a limited vision.¹¹⁹

¹¹⁵ Case C-243/95, *Hill and Stapleton v. Revenue Commissioners and the Department of Finance* [1998] ECR I-3739; [1998] 3 CMLR 81. See further Clare McGlynn and Catherine Farrelly, 'Equal Pay and the "Protection of Women in Family Life"' (1999) 24 *European Law Review* 202-7.

¹¹⁶ *Hill and Stapleton*, para. 42.

¹¹⁷ *Hill and Stapleton*, para. 42.

¹¹⁸ See also Case C-1/95, *Gerster v. Freistaat Bayern* [1997] ECR I-5253; [1998] 1 CMLR 303, para. 38, in which the Court stated that: 'The protection of women – and men – both in family life and in the workplace is a principle broadly accepted in the legal systems of the member states as the natural corollary of the fact that men and women are equal and is upheld by Community law.'

¹¹⁹ It is also a principle which the Court did not apply in the later case, Case C-249/97, *Gruber v. Silhouette International Schmied GmbH & Co. KG* [1999] ECR I-5295, in which the Court rejected the argument that resigning from employment because of the absence of adequate childcare arrangements was equivalent to the other 'important' reasons for leaving employment. Her sex discrimination claim was therefore rejected. See O'Leary, *Employment Law at the Court of Justice*, pp. 221-2.

Such a limited approach was reinforced in the first case to consider the Parental Leave Directive. In *Lewen*, the Court held that the payment of a Christmas bonus was not a 'right' protected by the Parental Leave Directive, despite the clause stating that 'rights acquired or in the process of being acquired' must be maintained.¹²⁰ Accordingly, Lewen was not able to utilise the directive to challenge her employer's refusal to pay her a Christmas bonus while on parental leave. Although Lewen was granted a remedy in part, this was on the basis of indirect sex discrimination as 'female workers are likely . . . to be on parenting leave far more often than male workers'.¹²¹ In this way, the potentially adverse impact of childcare responsibilities on employment opportunities is only recognised in the context of the existing sex equality laws, not the Parental Leave Directive, and only for women. This reinforces the assumption that such childcare commitments are the primary responsibility of women and it is only women whose employment rights require protection.¹²² This ruling negates the purpose of the Directive in that, although men can take leave, their employment rights will not be protected to the same extent as those of women, as a man in a similar position to Lewen would not have been able to challenge the employer's actions. Moreover, as Lewen's rights were only protected by indirect discrimination, this means that as more men avail themselves of the right to parental leave, as is the explicitly stated aim of the legislation, the rights of women will be reduced as they will be less able to claim indirect discrimination. This is a preposterous situation in which the rights of women and men are pitted against one another. This is counter-intuitive as it means that the very ambition of many women, that men be more involved in childcare, will lead to a reduction in their own rights.

A further problematic aspect of this judgment was the fact that the Court held that, when calculating the amount of a bonus, compulsory periods of maternity leave must be taken into account, whereas time on parental leave could reduce the bonus payable.¹²³ This approach is explicable in view of the Court's pregnancy discrimination jurisprudence, but underlines the obstacles to encouraging greater parental care by men. If women's entitlements are protected in this way, but not men's, it is of little surprise that few men avail themselves of leave. Furthermore, it means that women's rights are best protected by sex specific, rather than sex neutral, provisions. Thus, rather than supporting a move away from *maternity* rights to *parenting* rights, the consequence of the Court's ruling may be to encourage the enactment of sex specific rights. This is because, where parenting rights are enacted in a gender neutral fashion, it in effect reduces the rights and entitlements of women where those would have been characterised as maternity

120 Clause 2(6) of the framework agreement annexed to Directive 96/34/EC, OJ 1996 L 145/4.

121 Case C-333/97, *Lewen v. Denda* [1999] ECR I-7243; [2000] 2 CMLR 38, para. 40.

122 See further Eugenia Caracciolo di Torella, 'Childcare, Employment and Equality in the EC: First (False) Steps of the Court' (2000) 25 *European Law Review* 310–16.

123 *Lewen v. Denda*, para. 47.

rights. In providing some protection for women, over and above rights for parents, the Court appears to be mimicking the approach to reconciliation considered in the section above. In other words, the reconciliation policy focuses attention on *women's* labour market position, rather than on a more general approach to the parenting rights of women and men.

This approach has been confirmed in the extraordinary case of *Lommers*.¹²⁴ A branch of the Dutch civil service reserved nursery places for its female employees, except in cases of emergency when they could be offered to men. Unsurprisingly, a male employee challenged this policy as constituting unlawful sex discrimination. The Court held that the scheme does 'create a difference of treatment on grounds of sex' and that the situations of a 'male employee and female employee, respectively father and mother of young children, are comparable as regards the possible need for them to use nursery facilities because they are in employment'.¹²⁵ However, the Court went on to state that the scheme was justified under Article 2(4) of the Equal Treatment Directive¹²⁶ as a measure designed to 'eliminate or reduce actual instances of inequality which may exist in the reality of social life'.¹²⁷

The Court then considered the facts of the case and referred to the under-representation of women in the Ministry of Agriculture, the proven insufficiency of nursery facilities and the fact that this is more likely to induce female employees to give up their employment. Accordingly, the Court held that the reservation of nursery places for women, except in emergencies, is within the category of 'measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers and are intended to improve their ability to compete on the labour market and to pursue a career on an equal footing with men'.¹²⁸ Of crucial importance, however, was the existence of the potential exception in favour of men. The Court held that a scheme such as the one under consideration which did not grant access to men who 'take care of their children by themselves' would go beyond the permissible scope of Article 2(4) of the Equal Treatment Directive. The scheme, therefore, was held to be lawful for so long as men who take care of children by themselves have access to places on the same conditions as women.

Although the judgment of the Court suggests that this ruling is positive for women, in that it is a legitimate measure of positive discrimination, in practice it reproduces the dominant ideology of motherhood which hinders women's

¹²⁴ Case C-476/99, *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891; [2004] 2 CMLR 49.

¹²⁵ *Lommers*, para. 30.

¹²⁶ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40.

¹²⁷ *Lommers*, para. 32.

¹²⁸ *Lommers*, para. 38.

progress in the workplace and reaffirms the inferior status of fatherhood. Indeed, the Court referred to academic opinion which considers that 'measures such as those' under discussion are 'likely to perpetuate and legitimize the traditional division of roles between men and women'.¹²⁹ And this is indeed what such measures and this judgment will do. Legitimizing the grant of childcare places to women only simply serves to reinforce the fact that they are primarily responsible for childcare. As with *Abdoulaye*, this judgment seeks to deal with the symptoms of discrimination, rather than treating the cause. It is the case that women remain largely responsible for childcare and that they are more likely than men to leave work if childcare is in short supply or is of poor quality. The remedy for this, however, is not to grant places only to women, but to ensure that women are not primarily responsible for childcare and that good quality childcare places are widely available. The judgment may assist some women in the short term, but in the longer term it reinforces disadvantageous assumptions.

Furthermore, the emphasis placed by the Court on the exception in favour of fathers 'who take care of their children by themselves'¹³⁰ is equally problematic. This formulation suggests that only single fathers would come within the exception, whereas there is no such proviso in favour of women.¹³¹ This is precisely because of the underlying assumption that women, whether in partnerships or not, will take primary responsibility for childcare, whereas men will only do so where they are on their own. Thus, the exception for men simply reinforces the assumptions about women's roles and the dominant ideology of fatherhood. It suggests that, in a partnership where childcare is shared, the father would not be eligible for a childcare place under this scheme. It is this result which ultimately demonstrates the adverse impact of this judgment.

Fortunately, there are some limits as to how far the Court will expand the scope of justifications for discrimination. In *Griesmar*, the Court held that a French government retirement scheme which granted credits to women with children, regardless of any time away from the workplace, constituted unlawful sex discrimination.¹³² The Advocate General had held otherwise, suggesting that, following *Abdoulaye*, the credit was a legitimate measure designed to offset the disadvantages of raising children.¹³³ The French government had similarly claimed that the credits addressed a 'social reality', namely the disadvantages which women incur in the course of their professional careers by virtue of the 'predominant role assigned to them in bringing up children'.¹³⁴ The Court

¹²⁹ *Lommers*, para. 22.

¹³⁰ *Lommers*, para. 50.

¹³¹ It seems that this is the interpretation placed on the judgment by the Court in its press release which acclaims the judgment as representing 'progress for lone fathers' who are to be treated equally with lone mothers. *Agence Europe*, 21 March 2002.

¹³² Case C-366/99, *Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie* [2001] ECR I-9383; [2003] 3 CMLR 5.

¹³³ Opinion of 22 February 2001, [2001] ECR I-9383; [2003] 3 CMLR 5.

¹³⁴ *Griesmar*, para. 51.

rejected the argument because there was no link made between the credit and any absences from work on maternity or parental leave,¹³⁵ holding that 'situations of a male civil servant and a female civil servant may be comparable as regards the bringing-up of children' so there can be no discrimination.¹³⁶ The Court here particularly emphasised the fact that there was no credit available for a man who had assumed the task of bringing up his children and was thereby exposed to the same career disadvantages.¹³⁷ The implication is that, had there been such an exception, this might have led to a different result.

The Court reached the correct judgment in this case. Credits should be granted to women and men who have taken time away from the workplace to care for children. This would ensure that those individuals do not suffer disadvantage when it comes to retirement. In addition, recognition is given that, when it comes to the upbringing of children, mothers and fathers should be treated the same. But they are not so treated in situations like *Abdoulaye* and *Lommers*. Therefore, we have a situation where parents are to be treated equally, except where they are legitimately not treated equally. The line drawn between the two situations is not sufficiently clear, and the confusion will simply hinder attempts to ensure equality for mothers and fathers. As Siofra O'Leary rightly argues, the Court's case law is 'riddled with confusion and contradiction'.¹³⁸

It can be seen, therefore, that the Court's approach to parenting relies on the sexual division of labour and reproduces the traditional ideologies of motherhood and fatherhood. Despite the Union's perceived economic need to ensure greater participation of women in the labour market, it fights shy of the real measures that would need to be taken so that women would feel able and willing to increase their paid work. The Court of Justice, in particular, is confused in its jurisprudence regarding sex equality and the reconciliation of paid work and family life. It appears to flit between what it perceives as beneficial positive discrimination and gender neutrality, with little consistency and continuing adverse symbolic and practical effects.

4.3 Parenthood and the Union's evolving family law

In 2001, the Union adopted its first measure in the family law field, providing for the jurisdiction, recognition and enforcement of judgments relating to marital breakdown and parental responsibility.¹³⁹ However, this was no vanguard family law: no new opportunity was taken to establish modern laws reflecting changing social and conceptual realities. In fact, this first measure clearly reflected

¹³⁵ *Griesmar*, para. 52.

¹³⁶ *Griesmar*, para. 56.

¹³⁷ *Griesmar*, para. 56.

¹³⁸ O'Leary, *Employment Law at the Court of Justice*, p. 220.

¹³⁹ For a detailed examination, see chapter 6. This section concentrates on the implications of this area of law specifically in relation to the concept of parenthood.

the dominant ideology of the family and hence a traditional conception of parenthood.¹⁴⁰

At the national and international level, there has been an increasing separation of marriage from parenthood, with marriage fast being replaced by parenthood as the foundation of families. Historically, marriage was the basis for 'the family' in view of the factual difficulty of establishing paternity. Thus, legal presumptions were developed such that paternity may be assumed in certain situations, most notably marriage. In this way, parenthood became synonymous with marriage and fatherhood was assumed to exist only within the nuclear family. Thus, marriage became a key element in our understanding of what it means to be a father. This traditional perspective also conceived of biological children as the possessions of their parents, who had exclusive rights in relation to them and in whom all parental decisions should reside. The social reality of increasing numbers of children born to parents outside of marriage, often cohabiting, combined with increasing levels of divorce and the formation of step-families, necessitated changes in this approach, with parenting becoming separated from marriage. Furthermore, the emphasis placed by modern family law on the child's best interests requires consideration of non-biological and non-marital relationships which may be central to ensuring the child's welfare and interests.

For this reason, the social reality of parenting becomes more important than the civil status of the parents. A recognition of these changes is necessary to ensure that families which do not conform to the married nuclear norm do not suffer, either with fathers being excluded from parental rights, or children being prejudiced as a result of their parents' status, or lack of status. In addition, phases of family and relationship formation can be repeated throughout the lifecycle, for example through divorce, remarriage and reconstituted families, such that legal rules need to recognise such changes and reformations of families.¹⁴¹

It is lamentable, therefore, that the social and conceptual realities referred to above, and discussed elsewhere in this book, failed at first to make an impression on the Community legislature. Accordingly, the first family law measure adopted by the Community linked parenthood to marriage. Regulation 1347/2000 detailed new Community rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children.¹⁴² In relation to parents, therefore, the Regulation only dealt with disputes regarding the children of both spouses on the event of their divorce, separation or annulment. It excluded, therefore, disputes over the parental

140 See further chapters 6 and 7.

141 See Stalford, 'Regulating Family Life', referring to Wilfried Dumon, 'Recent Trends and New Prospects for a European Family Policy' in Henry Cavana (ed.), *The New Citizenship of the Family* (Aldershot: Ashgate, 2000).

142 Council Regulation 1347/2000/EC of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19 (repealed by Regulation 2201/ 2003).

responsibility for step-children, children of unmarried or same-sex partners and adopted children of only one partner, and therefore excluded many forms of social parenthood from its scope. Thus, the personal scope of the Regulation mirrored the highly restrictive dominant ideology of the family. Accordingly, the status of the parents appeared to be more important than the interests of the child or the child–parent relationship. It meant that there was one set of rules for children of married parents and another for those whose parents have not married. The arcane nature of such a distinction should not need emphasising. Not only did it go against any modern conception of parenthood, but it also restricted the rights of children, with their interests clearly not being a primary consideration and there being potential discrimination on the grounds of their birth, contrary to Articles 21 and 24 of the Union’s Charter of Fundamental Rights.

The inadequacies of this regulation were very soon recognised and in 2003 a new Regulation was adopted which concerns all parental responsibility judgments, regardless of the status of the parents.¹⁴³ The Preamble states that its aim is to ensure ‘equality for all children’ with the Regulation covering parental responsibility decisions ‘independently of any link with a matrimonial proceeding’.¹⁴⁴ The Preamble also refers to the Charter, in particular to the rights of the child in Article 24 of the Charter.¹⁴⁵ The ‘hearing of the child’ is said to play an ‘important role’ in the application of the Regulation, although this is not intended to modify existing national procedures. This emphasis on the rights of the child, and in particular the importance of their participation in decisions concerning them, where appropriate according to their age and maturity, represents an important move away from a paternalistic approach to the parent–child relationship in which the child’s future is decided with little reference to him or her.¹⁴⁶ Nonetheless, the provisions on the rights of the child are considerably weaker than an earlier draft of the Regulation.¹⁴⁷ Helen Stalford argues that the concept of the child and their rights under these measures is based more on a ‘welfare’ approach to the children, rather than an ‘agency’ approach recognising the independence of the child.¹⁴⁸ There appears to be a general reluctance to endorse

143 Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000/EC, OJ 2003 L 338/1.

144 Preamble (para. 5) to Regulation 2201/2003/EC, OJ 2003 L 338/1.

145 Preamble (para. 33) to Regulation 2201/2003/EC, OJ 2003 L 338/1.

146 Helen Stalford, ‘Brussels II and Beyond: A Better Deal for Children in the EU?’ in Katharina Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp: Intersentia, 2003), pp. 471–88 at p. 476.

147 For example, an earlier draft included an Article stating: ‘A child shall have the right to be heard on matters relating to parental responsibility over him or her in accordance with his or her age and maturity.’ This general provision has been replaced with one in which the scope of existing national rules is secured, with only a limited provision allowing the non-recognition where such national rules have not been followed. For a discussion, see Stalford, ‘Brussels II and Beyond’, 477.

148 Stalford, ‘Brussels II and Beyond’, 480.

children's active and direct rights within cross-national family law. This in turn underpins the paternalistic model of dependency that underpins traditional Union legislation relating to families, suggesting little ideological movement beyond the original 1960s free movement provisions. It also reinforces the hierarchical attitude to parenthood, rather than a more co-operative 'joint venture' approach which recognises the independence, autonomy and interests of the child.

There remains a final concern with the Community's family law measures in the context of parenthood. Concerns have been expressed regarding the potential for forum shopping resulting from these new measures.¹⁴⁹ Particular concern has been expressed regarding the potential for individuals seeking a divorce to seize jurisdiction in the member state which offers the divorce provisions best suited to their needs. But the issue may also arise in connection with parental responsibility issues. While it is true that the parent is required to establish a close connection with the state in which the parental rights are being challenged or enforced, there are possibilities for forum shopping especially where the practice of member states regarding parental responsibility varies so considerably. In addition, the considerable divergence between the practice of member states regarding gay and lesbian parenthood may become a focus for conflict.¹⁵⁰ Non-recognition of parental responsibility judgments is permitted where it would be 'manifestly contrary to the public policy' of the member state concerned.¹⁵¹ Whether this would permit non-recognition in the case of orders in favour of gay and lesbian parents is perhaps unlikely, but nevertheless may be a focus for dispute.¹⁵²

The Union's evolving family law has not, therefore, begun well. Its first measure reinforced the dominant ideology of the family, in particular reproducing a traditional approach to parenthood based on marriage and hierarchy over children. This is a law which reinforced the lowest common denominator in member state negotiations and in doing so wreaked havoc on those families and children which did not conform to the ideal norm. While the most recent Regulation is a significant move forward, the pattern has been established. We are now playing catch-up: the norm has been prescribed and forever after we will be engaged in complex and controversial negotiations to attempt to move the boundaries even slightly.

149 See David Truex, 'Brussels II – It's Here' (2001) 7 *International Family Law Review* 7–9; Nicolas Mostyn, 'Brussels II – The Impact on Forum Disputes' (2001) 31 *Family Law* 359–67.

150 See further Kate Griffin, 'Getting Kids and Keeping Them: Lesbian Motherhood in Europe' in Dunne (ed.), *Living 'Difference'*, pp. 23–34.

151 Article 23(a) of Regulation 2201/2003/EC, OJ 2003 L 338/1.

152 The judgment of the European Court of Human Rights in *Da Silva v. Portugal* (No. 33290/96), (2001) 31 EHRR 47 should ensure that non-recognition is not permitted on this basis.

4.4 Conclusions

At first sight, it may not be obvious that Union law and policy engage with concepts of motherhood and fatherhood. However, as discussed in the previous chapter regarding children, it became clear relatively early in the history of the Community that the impact of its economic policies extended far beyond the mere completion of a single market. In particular, the development of sex equality policies necessarily involves the concept of parenthood, regardless of what the Court of Justice first sought to claim. Thus, for so long as sex equality is an objective of Community policy, the concept of parenthood will be a focus for debate within Community law. Similarly, the Union's employment policy, with its aim to increase the labour market participation of women, must address the balance of paid work and family life, and therefore parental roles, if it is to be successful in achieving its aims. In terms of the future, it may be the Union's emerging family law that will in time have the most impact on the rights of parents and the nature of the parental role. As yet, the direction of these measures is not clear, although the first indications are not wholly positive.

The approach of the Union to parenthood is best described as ambiguous. Perhaps that is inevitable when faced with the wide scope of Union law and policy which encompasses this field. However, even within the scope of discrete fields of law, such as sex equality law, the Union's rhetoric and the reality of the Court's jurisprudence are far apart. In other areas, such as the emerging family law, the Union made an unfortunate start, but appears now to be moving towards a more egalitarian approach to parenthood. If the Community is to achieve its goal of greater workplace participation by women, and if the Union is to receive the support of the European citizens for its incursions into the controversial field of family law, and if the Union is to meet its human rights commitments as detailed in the Charter of Fundamental Rights, it must embrace a concept of parenthood which is more gender neutral than gender distinctive and which furthers the ideals of equal parenting.